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Supreme Court, U.S.
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No. 95-2083

In The

Supreme Court of the United States

October Term, 1995

CHERRY HILLS RESORT DEVELOPMENT COMPANY, a Colorado Limited Partnership,

Petitioner,

vs.

THE CITY OF CHERRY HILLS VILLAGE,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Court grant certiorari review of a state court factual decision that a plaintiff had failed to prove damages?

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Respondent requests denial of the petition for certiorari review by this Court of a decision of the Colorado Court of Appeals. The Court of Appeals opinion, which is unreported, is reproduced at Appendix 3a-7a to the petition.

STATEMENT OF THE CASE

Petitioner attempts to justify this Court's acceptance of jurisdiction of the petition under 28 U.S.C. § 1257(a) and exercise of its discretionary powers of certiorari review under Supreme Court Rule 10(c) by characterizing the decision below as one that decided an important and undecided question of federal law and/or decided an important federal question in a way that conflicts with decisions of this Court (Pet. p. 6). In fact, no question of federal law, important or unimportant, decided or undecided by this Court, was decided by the Colorado Court of Appeals. On the contrary, the first phase of the proceedings below (which is much referenced by Petitioner in its petition but is not the subject of the petition for review by this Court) concerned only state court review of a quasi-judicial land development decision by Respondent, a municipality. The second phase (which is addressed by the petition) did concern alleged deprivations of the United States constitutional or statutory rights, but it was resolved against Petitioner in the Colorado Court of Appeals by affirmance of the trial court decision that Petitioner had failed to prove damages flowing from the alleged deprivations, thereby obviating the need for the state appellate court to consider the merit of the trial court's rejection of Petitioner's constitutional and statutory claims. Thus the issues which Petitioner asserts are implicated by the decision below are not appropriate subjects for discretionary certiorari review by this Court in this case, whatever their importance or status in other cases may or may not be.

A. Proceedings Below That Are Not Addressed By The Petition.

Petitioner filed this action in the District Court for Arapahoe County, Colorado, in 1982, seeking certiorari review by that court under C.R.C.P. 106(a)(4) of a quasi-judicial decision by Respondent limiting in certain respects its approval of Petitioner's plan for development of real property. Under C.R.C.P. 106(a)(4), such certiorari review is available where it is claimed that a municipality such as Respondent exceeded its jurisdiction or abused its discretion. Petitioner claimed that Respondent had both exceeded its jurisdiction and abused its discretion by including the limitations in its approval of the development plan. Further, Petitioner asserted damage claims under United States and Colorado constitutional provisions and under 42 U.S.C. § 1983.

The District Court in 1984 entered final judgment in favor of Petitioner on its Rule 106(a)(4) claim as to some but not all of the limitations; it dismissed certain of the damage claims but did not enter final judgment on any of them. Respondent appealed the District Court judgment on the C.R.C.P. 106(a)(4) claim. The Colorado Court of Appeals in 1986 held that the District Court did not have jurisdiction over the Rule 106 claim and directed that the complaint be dismissed. The Colorado Supreme Court reversed, holding that the District Court did have jurisdiction, and remanded the case to the court of appeals to consider the original Rule 106 claim.

On remand the Court of Appeals found in 1988 that Respondent had not exceeded its jurisdiction or abused its discretion within the meaning of Rule 106. The case returned to the Supreme Court, which again reversed, finding in 1990 that certain of the limitations contained in Respondent's approval of Petitioner's development plan exceeded Respondent's jurisdiction or abused its discretion. That decision by the

Colorado Supreme Court concluded the proceedings below relating to Petitioner's Rule 106 claim, and despite the attention given to that phase of the proceedings below in the Petitioner's petition for review by this Court, the petition does not seek review of the Rule 106 claim or the Colorado state court proceedings on that claim.

B. Proceedings Below That Are Addressed By The Petition.

After the 1990 Colorado Supreme Court decision, Petitioner moved in the District Court, based on a change in the law, to reinstate certain of the damage claims premised on the United States Constitution that previously had been dismissed by the District Court. Certain damage claims were reinstated by the District Court. All surviving damage claims were tried in 1992. In 1993 the District Court issued its decision finding against Petitioner on all of its claims of United States and state constitutional or statutory violations and further finding that in any event under Colorado law Petitioner had failed to establish by a preponderance of the evidence that it had sustained any damages flowing from the alleged constitutional and statutory violations.

On appeal, the Colorado Court of Appeals affirmed the decision of the District Court, noting that "[Petitioner] advances the arguments it presented before the trial court in an attempt to have the [Respondent's] actions declared to constitute a taking, to result in damage to the property, and to violate [Petitioner's] right to substantive due process. We do not reach these issues because [Petitioner's] failure to establish that its damages are traceable to, and are the direct result of, the [Respondent's] invalid conditions precludes its recovery of any but nominal damages under all of its various claims."

That is the decision by the Colorado Court of Appeals that

the Colorado Supreme Court, notwithstanding its previous attention to the Rule 106 phase of the case, deemed unworthy of certiorari review. And that is also the decision that Petitioner contends is so important a decision on constitutional and 42 U.S.C. § 1983 issues as to authorize and compel this Court to grant certiorari review.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT SUPPORT JURISDICTION UNDER 28 U.S.C. § 1257(a).

28 U.S.C. § 1257(a) allows certiorari review by this Court only in limited circumstances, *viz.*, for purposes of this petition, where a state court decision draws in question the validity of a United States statute or a right is specially set up or claimed under the United States Constitution or statute. Petitioner claimed deprivation of United States constitutional rights and violation of 42 U.S.C. § 1983, but those claims, *albeit* addressed and rejected by the trial court, were not addressed by the Court of Appeals, which sustained the trial court's alternative basis for decision, *i.e.*, that Petitioner had failed to meet its burden of proof of any damages flowing from any of the claims. Thus Respondent submits that the decision below did not draw into question the validity of 42 U.S.C. § 1983 or address any right claimed under either § 1983 or any United States constitutional provision.

II.

THE DECISION BELOW DOES NOT IMPLICATE IMPORTANT FEDERAL QUESTIONS SO AS TO JUSTIFY EXERCISE OF THIS COURT'S DISCRETIONARY CERTIORARI REVIEW.

Implicitly recognizing that the decision below is little more than a fact-based determination of the sufficiency of evidence at the trial court level to meet the state law requirements for proof of damages flowing from alleged wrongs, Petitioner begins its argument (Pet. p. 6) by invoking Supreme Court Rule 10(c)[1] references to state court decisions of important federal questions and then (Pet. pp. 6-7) characterizing the decision below as one that "presents the opportunity to answer significant and recurring questions" and "raises issues related to the application of this Court's decisions" and "raises issues surrounding 'substantive due process' claims in land use cases brought under 42 U.S.C. § 1983 this Court sought to resolve" in a case in which certiorari review was first granted and then dismissed as improvidently granted.

It appears that not even Petitioner can bring itself to say that the Colorado Court of Appeals actually "decided" an important federal question that has not been but should be settled by this Court or that it actually "decided" an important question in a way that conflicts with relevant decisions of this Court. Indeed, not even in Petitioner's argument on the five different (*albeit* largely overlapping) "Questions Presented" does Petitioner actually assert that such a "decision" was made by the court below. Rather, Petitioner seems to believe that if it can bring some aspect of the proceeding below within the aura of this Court's

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1. The citation in Petitioner's brief is to Supreme Court Rule 10(b), but the language of the rule relied upon is contained in Rule 10(c) (*see* Pet. p. 6).

concern about local governmental acts affecting rights in real property emanating from the penumbra of recent land use decisions of this Court, it can fool this Court into thinking that the decision below cries out for review by this Court. This case may touch upon issues of current concern to this Court, but it is not one that justifies review by this Court. No federal question was decided, certainly none of such importance that this Court should expend any of its discretionary review on it.

III.

THE DECISION BELOW RESTS ON ADEQUATE NON-FEDERAL GROUNDS SO AS TO PREVENT DISCRETIONARY REVIEW BY THIS COURT.

Whether or not the decision below decides a federal question, and whether or not that question is important and either undecided by this Court or already decided by this Court, certiorari review is not granted where the decision below rests on adequate non-federal grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1954). The decision of the Colorado Court of Appeals did not address the federal questions arguably implicated in the proceedings below, but even if that court, like the District Court, had addressed and rejected them, or if the District Court were viewed as the "highest court" of Colorado for purposes of certiorari review in this instance, the decision below nonetheless would rest on adequate non-federal grounds.

The non-federal ground is the failure of Petitioner to meet its burden of proof of any damages flowing from any of the alleged constitutional or statutory wrongs. The factual finding of the District Court, sustained by the Court of Appeals, was that none of the losses sustained by Petitioner, whether out-of-pocket expenses or lost profits or otherwise, had been shown, as required by Colorado law, by a preponderance of the evidence,

with reasonable certainty, to be traceable to and the direct result of any of the alleged wrongs (Court of Appeals Opinion at Appendix 5a-6a; *see also* District Court Opinion at Appendix 64a-68a). As the Court of Appeals noted (Appendix 6a):

> The trial court, upon thorough consideration and with record support, determined that [Petitioner] did not establish by a preponderance of the evidence that it would ever have been able to obtain financing for the project,[2] or that it would realize any profit from the project. Although the court considered the measure of damages for each of [Petitioner's] claims, it ultimately concluded that the restrictive conditions did not cause any loss to [Petitioner]. Neither the restrictions nor the pending lawsuit caused the project to remain unfinanced and undeveloped.

Petitioner attempts to circumvent this obvious and insurmountable barrier to review by arguing (Pet. p. 9) that the proof of damage issues are "false issues" since the Colorado Supreme Court, in the Rule 106 phase of the proceedings below, found that Respondent had acted improperly in imposing certain of the conditions, and "This being so, of what possible legal significance could the inquiry into Petitioner's ability to develop the property subject to the unlawful conditions be?" That question begs the question. It needs no citation of authority to say

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2. *See* discussion of "Financing" by District Court at Appendix 27a-35a. *See also* summary conclusion of District Court at Appendix 68a: "Finally, the Court has concluded that the restrictive conditions did not cause any loss to the [Petitioner]. Neither the restrictive conditions nor the pending lawsuit caused the project to remain unfinanced and undeveloped."

that except in limited circumstances such as "libel per se," damages must be shown to flow from wrongs in order to recover damages.

Petitioner further attempts to avoid the "adequate non-federal grounds" barrier to its petition by asserting (Pet. 14-16) that in an action under 42 U.S.C. § 1983,[3] out-of-pocket losses are recoverable.[4] It doesn't matter whether they are or aren't, given the District Court findings that Petitioner failed to prove the wrongful actions of the City caused the failure of the project and that the failure of the project caused any damages sustained by Petitioner.

Failure of proof of any damages, whatever the measure, attributable to alleged federal constitutional or statutory wrongs clearly constitutes an adequate non-federal ground for decision and mandates that this Court decline to exercise its discretion to review the decision of the Colorado courts.

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3. In the Court of Appeals, Respondent contended that there was no substantive due process claim under § 1983 in the case. The Court of Appeals, of course, did not reach that argument by Respondent since it upheld the trial court finding of no damages of any sort attributable to the wrongs claimed.

4. It is true that the District Court concluded that out-of-pocket expenses are not recoverable as damages under either a taking claim or a § 1983 claim. *See* Appendix 67a.

CONCLUSION

The petition makes much ado about nothing of concern to this Court. It should be denied.

Respectfully submitted,

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